

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division**

<b>In re:</b>	:	<b>Chapter 11</b>
	:	
<b>Circuit City Stores, Inc., et al.,</b>	:	<b>Case No. 08-35653 (KRH)</b>
	:	
<b>Debtors.</b>	:	

**OBJECTION OF DESOTO COUNTY, MISSISSIPPI TO THE  
DEBTORS' JOINT FIRST AMENDED PLAN OF LIQUIDATION**

DeSoto County, Mississippi ("DeSoto County"), a tax creditor holding both administrative and pre-petition claims against Circuit City Stores, Inc. (the "Debtors") in these proceedings, by counsel, hereby objects to the First Amended Joint Plan of Liquidation (the "Plan") proposed by the Debtors and the Official Committee of Unsecured Creditors. In support of its objection, Desoto County states as follows:

1. The Debtors owe DeSoto County a total of \$49,021.65, plus interest and penalties for 2008 personal property taxes arising from furniture, fixtures and equipment located in DeSoto County. On August 12, 2009, DeSoto County filed its Notice of Tax Lien (the "Motion"). See Docket Entry No. 4452. A copy of the Notice is attached hereto as **Exhibit**
2. Under Mississippi law, *ad valorem* taxes are secured by first priority statutory

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lien, and are therefore secured claims. Specifically, Miss. Code § 27-35-1 provides that “[t]axes (state, county and municipal) assessed upon lands or personal property, . . . shall bind the same and, except for environmental covenants created pursuant to the Mississippi Environmental Covenants Act, shall be entitled to preference over all judgments, executions, encumbrances or liens whensoever created; and all such taxes assessed shall be a lien upon and bind the property assessed.”

3. Desoto County’s statutory lien is entitled to superior priority to all other liens on the Debtors’ tangible personal property, or proceeds thereof. Desoto County objects to the Plan as it seeks, pursuant to Article V, para. G, to invalidate DeSoto County’s lien without filing an adversary proceeding as required by Rule 7001, or otherwise providing for the satisfaction of its lien. See, e.g. SLW Capital, LLC v. Janica Mansaray-Ruffin, 530 F.3d 230, 235 (3<sup>rd</sup> Cir. 2008) (“The three concepts included in Rule 7001(2) – validity, priority, and extent – all pertain in some way to ‘the basis of the lien itself.’ Fed. R. Bankr.P. 3012 advisory committee’s note. The ‘validity’ of a lien — which, unlike ‘priority’ and ‘extent,’ is at the heart of the case before us —refers to its ‘legal force.’ American Heritage Dictionary of the English Language (4th ed.2004)”).

4. The Third Circuit favorably quoted the Fourth Circuit regarding the survival of liens in bankruptcy:

[T]he general rule [is] that liens pass through bankruptcy unaffected. A bankruptcy discharge extinguishes only in personam claims against the debtor(s), but generally has no effect on an in rem claim against the debtor’s property. For a debtor to extinguish or modify a lien during the bankruptcy process, some affirmative step must be taken toward that end. Unless the debtor takes appropriate affirmative action to avoid a security interest in property of the estate, that property will remain subject to the security interest following confirmation.

Id. (citing Cen-Pen Corp. v. Hanson, 58 F.3d 89, 92 (4th Cir.1995)).

5. Desoto County objects to Debtors’ Plan as it fails to properly treat and/or

provide for Desoto County's claim/tax lien in Class 1, and as it seeks, in Article II, para. G, and in Article X, to render Desoto County's tax lien as unenforceable, without any provision for satisfaction of its lien. Notably, secured creditors are not required to file proofs of claim. See Universal Am. Mortgage Co. v. Bateman (In re Bateman), 331 F.3d 821, 827 (11th Cir. 2003) ("An unsecured creditor is required to file a proof of claim for its claim to be allowed, but filing is not mandatory for a secured creditor."); Relihan v. Exchange Bank, 69 B.R. 122 (S.D. Ga. 1985) (secured creditor did not lose its lien as a result of failure to file proof of claim); In re Stewart, 247 B.R. 515 (Bankr. M.D. Fla. 2000) (generally accepted that a secured creditor is not required to file a proof of claim).

6. The Plan is also objectionable in that it allows the Liquidating Trustee to pay Class 1 Miscellaneous Secured Claims out of a Liquidating Trust without regard to the priorities among the Miscellaneous Secured Claims. Specifically, the Plan states: "[N]o Distribution shall be made to the Holder of any Allowed Miscellaneous Secured Claim unless either (a) the Liquidating Trust has sufficient Available Cash to pay, or reserve for, as the case may be, the Face Amount of all Miscellaneous Secured Claims or (b) the Liquidating Trust Oversight Committee consents to all or a portion of such Distribution." Plan, ¶ III. B. 1.

7. The Plan, Paragraph III, B. 1, states that all Miscellaneous Secured Claims are unimpaired. However, this is not true if the Liquidating Trustee pays other Miscellaneous Secured Claims ahead of Desoto County's statutory superpriority property tax claim/lien, such that Desoto County fails to receive the full amount of its claim/lien, including interest. Because the statutory lien securing Desoto County's claim is a first priority lien under Mississippi law, the allowed amount of its 2008 taxes should be the full amount stated in its Notice of Tax Lien, and the entire amount of the claim should be deemed secured under 11 U.S.C. §506(a)(1). As such, the Plan violates 11 U.S.C. §1129(b)(2)(A)(i)II. Accordingly, the Plan should provide that

in the event there is insufficient Available Cash to pay all allowed Miscellaneous Secured Claims in full, Allowed Miscellaneous Secured Claims shall be paid in the order of their lien priorities.

8. Paragraph III.B.1 of the Plan also fails to provide that interest will be paid on the statutory tax claims at the statutory rate under state law, as required by 11 U.S.C. §506(b),511(a). Desoto County is over-secured because its lien is superior to all consensual liens. Desoto County is entitled to post-petition interest under §506(b) on its secured claim/lien.

9. Section 506(b) states:

To the extent that an allowed secured claim is secured by property, the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, any reasonable fees, costs or charges provided for under the agreement or State statute under which such claim arose.

11 U.S.C. §506(b)

10. Miss. Code § 27-41-9 of the Mississippi Statutes provides that interest on delinquent property taxes accrues “at the rate of one percent (1%) per month”. Thus, Desoto County is entitled to interest at 12% per annum, compounded monthly, on its over-secured claim/lien.

11. Furthermore, “[i]f any provision of this title requires payment of interest on a tax claim or on an administrative expense tax, or the payment of interest to enable a creditor to receive the present value of the allowed amount of the tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law”. See 11 U.S.C. § 511(a). Accordingly, the Plan should provide interest to be paid on all property tax claims at the rate determined under applicable non-bankruptcy law until such property tax claims are paid in full.

12. As an over-secured creditor, Desoto County is entitled to (i) post petition - pre-Effective Date Interest under 11 U.S.C. §506(b), and (ii) post-Effective Date interest for any period during which Desoto County’s secured claim remain unpaid. Plan Article III.B1 attempts

to deny Desoto County its statutory right to §506(b) interest, and at the same time unilaterally declare that Desoto County's claims are unimpaired and deny Desoto County the right to vote on the Plan as part of an impaired class. The Plan does not comply with 11 U.S.C. §506(b) and, therefore, under § 1129(a)(1), (2) and (3) cannot be confirmed.

13. Since the Plan proponents failed to properly solicit votes from any over secured creditors under the incorrect assumption that their claims were unimpaired, the Plan proponents have not complied with 11 U.S.C. §§1126 and 1129(a)(7) and (8) in the Plan solicitation process. Confirmation must, therefore, be denied under §§1129(a)(2) and (3).

14. The Plan Article VI.H attempts to limit Desoto County's setoff rights. Under 11 U.S.C. §553, setoff rights survive bankruptcy and are not affected "by other sections of the Bankruptcy Code." Further, a confirmation objection is sufficient to preserve setoff rights if the Plan attempts to abrogate or limit them. Desoto County objects to any alteration of its setoff rights.

15. Plan Article X.G. contains broad exculpation provisions that if read literally, would excuse parties' non-compliance with applicable statutes including tax laws. Federal law (28 U.S.C. 959(b) and 960) requires debtors in possession and trustees to comply with applicable laws in operating a business under Chapter 11. Nothing in the Bankruptcy Code authorizes the bankruptcy courts to exculpate multiple parties from complying with applicable laws, including tax laws, post-confirmation. There is no authority for excusing compliance with the law, and statutory violations, including violations of tax laws should be excepted from the Plan's exculpation provisions.

WHEREFORE, Desoto County, Mississippi requests that the confirmation of the Plan be denied and that it be entitled to such other and further relief as may be just and proper

**Respectfully Submitted,**

**DESOTO COUNTY, MISSISSIPPI**

**By Counsel**

/s/ William A. Gray

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of November, 2009, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Bankruptcy Court for the Eastern District of Virginia, Richmond Division, using the CM/ECF system, which thereby caused the above to be served electronically on all registered users of the ECF system that have filed notices of appearance in this matter, and was mailed, by U.S. Mail, first class, postage prepaid, to all persons on the attached Service List.

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/s/ William A. Gray

**EXHIBIT 1**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
(Richmond Division)**

**In Re:**

**CIRCUIT CITY STORES, INC., *et al.***

**Debtors.**

**Case No. 08-35653 KRH  
Chapter 11**

**NOTICE OF TAX LIEN BY  
DESOTO COUNTY, MISSISSIPPI**

COMES NOW DeSoto County, Mississippi, by and through the undersigned counsel, and files its Notice of Tax Lien and states:

1. Circuit City Stores, Inc. ("Debtor") owes Desoto County, Mississippi a total of \$49,021.65, plus interest and penalties for 2008 personal property taxes arising from furniture, fixtures and equipment located in the County. *See* Tax Statement, attached hereto as **Exhibit A**.

2. Pursuant to Miss. Code § 27-35-1, "[t]axes (state, county and municipal) assessed upon lands or personal property, . . . , shall bind the same and, except for environmental covenants created pursuant to the Mississippi Environmental Covenants Act, shall be entitled to preference over all judgments, executions, encumbrances or liens whensoever created; and all such taxes assessed shall be a lien upon and bind the property assessed."

3. To the extent Debtor or any of its affiliates attempts to sell or transfer any of its applicable furniture, fixtures or equipment or otherwise, DeSoto County, Mississippi hereby

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*Counsel for Desoto County, Mississippi*



provides notice of its statutory lien in the applicable property and/or, in the alternative, in the proceeds from the sale of any property under 11 U.S.C. § 363 or other applicable code provisions.

**Respectfully Submitted,**

**DESOTO COUNTY, MISSISSIPPI**

**By Counsel**

/s/ William A. Gray

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*Counsel for Desoto County, Mississippi*

**CERTIFICATE OF SERVICE**

I, William A. Gray, on this 12<sup>th</sup> day of August, 2009, do hereby certify that a true and correct copy of the foregoing Notice of Tax Lien by DeSoto County, Mississippi, was filed was electronically filed with the Clerk of the Court for the Eastern District of Virginia, using the CM/ECF system, which thereby caused the above to be served electronically on all registered users of the ECF system that have filed Notices of Appearance in this matter, and was mailed, by U.S. Mail, first class, postage prepaid, on the following parties

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/s/ William A. Gray

LOC-0000000000

PERSONAL  
\* REPRINT \*

TAXES DUE PAYABLE TO:

**JOEY TREADWAY, Tax Collector**  
365 Lusher St., Suite 110  
Hernando, MS 38632

NO. 837

PERSONAL  
\* REPRINT

FOR TAXES FOR REAL AND PERSONAL  
PROPERTY FOR FISCAL YEAR 2008  
DESCRIBED AND VALUED AS FOLLOWS:  
IT IS THE DUTY OF THE TAXPAYER TO CHECK HIS RECEIPT(S) TO SEE IF ALL HIS PROPERTY IS LISTED.

PROPERTY IDENTIFICATION NUMBER  
2896-000

TOT. ACRES	FOR PROT. AC.	TRUE VALUE	ASSD. VALUE	TAX RATE	TOTAL AD. VAL. TAX
		2301000	345150	142.03	49021.65

SEC: TWP: RGE:

TAXING DISTRICT DESCRIPTION:

2405 -DIST 2/S'HAVEN/TOWNE CENTER

6680 SOUTHCREST PK

CIRCUIT CITY STORES INC

TAX DEPT

P O BOX 42304

RICHMOND

VA 23242-0000

RATE NET ADV  
COUNTY 57.28 19770.19  
CITY 84.75 29251.46

DELINQUENT AFTER

FEBRUARY 1, 2009

RECD. BY

PAID BY CIRCUIT CITY STORES

☐ CASH ☐ CHECK ☐ MAIL

LEGAL DESCRIPTION  
FURN & FIX 90518 BANKS  
MACH & EQ DEBTS  
LEASED EQ MISCEL  
INVENTORY 254632

SPECIAL HOMESTEAD CREDIT

VALUE	RATE	AMOUNT
NET AD. VAL. TAX		49021.65
FOREST PROT. TAX		

TOTAL TAXES DUE	49021.65
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INTEREST	
FEES/DISTRESS	
ENROLLMENT	49021.65
TOTAL	
GRAND TOTAL PAID	

